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Supreme Court, U.S.
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No. 94-428

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF UNDER RULE 15.7

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SUPPLEMENTAL ARGUMENT

I. THE DECISION IN THE PENDING HESS CASE MAY HAVE A BEARING ON THE CONFLICT PRESENTED BY THE RISTOWS' PETITION

A. INTRODUCTION

Recently, after the preparation of their Petition for Certiorari, the petitioners, Fred W. Ristow and Susan M. Ristow, learned of the existence of two consolidated cases pending before the United States Supreme Court, the decision of which may have a bearing on the issues in the case at hand. These cases are Hess v. Port Authority Trans-Hudson Corp. and Walsh v. Port Authority Trans-Hudson Corp., Supreme Court Docket No. 93-1197. The Ristows now file this Supplemental Brief pursuant to Supreme Court Rule 15.7.

B. THE HESS LITIGATION

On March 21, 1994, the Supreme Court

granted certiorari in these consolidated cases to review a decision of the Third Circuit entered on September 30, 1993. Certiorari was granted to review whether the Port Authority Trans-Hudson Corp., hereinafter referred to as PATH, is entitled to Eleventh Amendment immunity. Hess and Walsh, ____ U.S. ____, 114 S. Ct. 1292, 127 L. Ed. 2d 646 (1994).

The Third Circuit summarily affirmed, by a judgment order, without comment or analysis, the decisions of the United States District Court for the District of New Jersey in Hess which is reported at 809 F. Supp. 1172 (D.N.J. 1992) and in Walsh which is reported at 813 F. Supp. 1095 (D.N.J. 1993). The Court of Appeals' decision is reported in the table at 8 F. 3d 811 (3rd Cir. 1993). The details of the District

Court decisions will be discussed later. Briefs have been filed by the parties and amici curiae, and oral argument is scheduled to be heard on October 3, 1994.

C. SUMMARY OF PRIOR PATH LITIGATION AND ITS RELATIONSHIP TO THE RISTOWS' CASE

PATH and its parent, the Port Authority of New York and New Jersey, are bi-state entities, and they have previously been the subject of Eleventh Amendment litigation which has been cited and utilized extensively by the Ristows at the Fourth Circuit level and in their Petition for Certiorari. The differing approaches utilized by the Second Circuit in Feeney v. Port Authority Trans-Hudson Corp., 873 F. 2d 628 (2nd Cir. 1989), aff'd on other grds 495 U.S. 299, 110 S. Ct. 1868, 109 L. Ed. 2d 264

(1990) and by the Third Circuit in Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey, 819 F. 2d 413 (3rd Cir. 1987), cert. den. 484 U.S. 953, 108 S. Ct. 344, 98 L. Ed. 2d 370 (1987), to analyze the important financial factor in the sovereign immunity equation illustrate the existence of the actual financial analysis/broad financial approach conflict that forms the basis of the Ristows' Petition for Certiorari. (Petition, p. 22-35) In Feeney, the Second Circuit denied Eleventh Amendment immunity, while the Third Circuit reached the opposite result in Police Benevolent Association. (Petition, p. 23, 26)

The Supreme Court in Port Authority Trans-Hudson v. Feeney, 495 U.S. 299,

306-309, 110 S. Ct. 1868, 19 L. Ed. 2d 264, 273-275 (1990), resolved the conflict as to the Authority's status on alternative grounds finding that if the entity is entitled to sovereign immunity such immunity has been expressly waived. (Petition, p. 28-29) Thus, the issue as to whether the Authority is entitled to sovereign immunity and the underlying conflict as to the proper approach to be utilized in analyzing the financial factor remained unresolved by the Court. (Petition, p. 29) In arguing against sovereign immunity for the South Carolina State Ports Authority, the Ristows relied heavily on the actual financial analysis approach employed by the Second Circuit in Feeney and utilized by other Circuits as well. (Petition, p. 13-14, 25-28) Although admitting the Ristows'

financial arguments found support in Feeney, the Fourth Circuit was persuaded by the broad approach taken by the Third Circuit in Police Benevolent Association. (Petition, p. 14)

D. DISTRICT COURT HOLDINGS IN HESS AND WALSH

After the Supreme Court's waiver ruling, the Eleventh Amendment immunity issue concerning PATH and its parent would have appeared to be a moot point. However, the decisions of the United States District Court for the District of New Jersey in Hess and Walsh, and the Third Circuit's affirmance thereof, caused the issue to surface once again. In those cases, the District Court assumed PATH was entitled to sovereign immunity, but recognized the express waiver thereof. However, the District Court placed a condition precedent or restric-

tion on such waiver finding it to be effective only if suit was brought within one year of the date of the accident. (Hess petitioners' Main Brief, p. 9) Since Hess and Walsh failed to bring their actions within the one year period, their cases were dismissed. (Main Brief, p. 9)

E. A DISCUSSION OF HESS AND ITS POTENTIAL IMPACT ON THE RISTOWS' CASE

Having recently become familiar with the perding Hess litigation and having obtained and reviewed copies of the brief filed therein, the Ristows recognize that a decision in Hess may resolve the conflict in analyzing the important financial factor presented by their petition. The Ristows will now briefly discuss the Hess litigants respective positions.

1. THE HESS PETITIONERS'POSITION

The Hess petitioners' primary argument appears to be that PATH is not entitled to Eleventh Amendment immunity due to its character as a bi-state agency created by interstate compact and the particular facts surrounding its creation. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S.Ct. 1171, 59 L. Ed. 2d 401 (1979) is believed to have established a presumption against Eleventh Amendment immunity for entities created by interstate compact. (Main Brief, p. 13-14) According to Lake Country, an entity created by interstate compact cannot be afforded the protection of the Eleventh Amendment unless there is "good reason to believe that the States structured the new agency to enjoy the special constitutional protection of the States

themselves, and that Congress concurred in that purpose..." Lake Country, 440 U.S. at 401. Such presumption is consistent with the constitutional plan under which states in creating an interstate compact entity surrender their sovereignty as it relates to that entity. (Main Brief, p. 13-17)

The Hess petitioners then discuss extensively the reasons why the entity was not structured to enjoy immunity. (Main Brief, p. 17-32) These are briefly summarized as follows:

a. the compact language creating the Authority and Congressional consent provisions manifest an intent that it not be considered a State entity and entitled to Eleventh Amendment immunity; (Main Brief, p. 17-26)

b. the Authority characterizes itself as a political subdivision, has a separate legal identity and powers similar to a political subdivision, and is not subject to State control; (Main Brief, p. 26-32)

As additional support for the denial of immunity, the Hess petitioners argue that the financial factor favors the denial of immunity. (Main Brief, p. 33-38) Like the Ristows, they contend the Eleventh Amendment's purpose is to protect the state treasury from liability (Main Brief, p. 33-34) Using an actual financial analysis similar to the Ristows' approach, the Hess petitioners then discuss how the state treasuries of New York and New Jersey are protected from any judgment against PATH. (Main Brief, p. 34-38) PATH has its own funds

and is self-sustaining; it cannot pledge the credit of either State. (Main Brief, p. 34-37) Any appropriation by the States for a judgment against PATH is discretionary, and such voluntary appropriation does not trigger Eleventh Amendment protection. (Main Brief, p. 37-38) PATH has insurance. (Main Brief, p. 38)

On reply, the Hess petitioners again stress the importance of the financial factor as an alternative to their interstate compact arguments. (Reply Brief, p. 12-19) The Hess petitioners' financial arguments are clearly very similar to the Ristows'.

2. PATH'S POSITION

PATH's response is basically twofold: 1) it argues that the Port Authority was created to be immune and the

application of the Lake Country factors demonstrates this; 2) it takes issue with the petitioners' interpretation of the Eleventh Amendment which focuses on the protection of the state treasury from liability. (PATH's Brief, p. 4-34) PATH believes none of the factors set forth in Lake Country is pre-eminent or controlling. (PATH's Brief, p. 6) It argues the Port Authority was created as an immune state agency, not a political subdivision, and cites state case law to support its position. (PATH's Brief, p. 6-12) PATH contends it is administered as a state agency and performs state functions. (PATH's Brief, p. 12-22)

With respect to the important financial factor, PATH makes an argument strikingly similar to the broad financial approach discussed by the Ristows

in their Petition. (PATH's Brief, p. 22-27) Despite the insulation provisions, PATH believes the financial factor favors Eleventh Amendment immunity. PATH assets are held for the benefit of the people of the States. (PATH's Brief, p. 22-23) There is a close financial relationship between the States and the Port Authority; it was supported by State appropriations in its early years, a general reserve fund was required, and the States had access to surplus revenues to be used for other purposes. (PATH's Brief, p. 23-25)

> PATH alleges:
> "Money being fungible, the unavailability of Port Authority funds as a result, for example, of having to pay a money judgment would mean that the two States would have to look to their general treasuries to fund important projects or else deny the public the benefit of such services. In that sense, then, the Port Authority's mon-

> ey is a component of a "state treasury" since Port Authority money is being used for the benefit of the people of the two States for projects which must be authorized by their Legislatures." (PATH's Brief, p. 25-26)

PATH takes an expansive view of the "state treasury" in its analysis.

There is no doubt PATH's financial approach is virtually identical to that utilized by the Third Circuit in Police Benevolent Association and by the Fourth Circuit in the Ristows' case. It clearly illustrates the broad financial approach discussed by the Ristows. In its final argument, PATH disputes the Hess petitioners' view of the state treasury and attempts to de-emphasize the importance of the financial factor in an Eleventh Amendment analysis. (PATH's Brief, p. 28-34)

3. THE AMICI STATES' POSITION

The amici States argue that the Court's Eleventh Amendment jurisprudence has immunized the States regardless of whether a money judgment payable from the state treasury was involved. (States' Brief, p. 6-15) In these States' opinion, the proper test for determining if a state agency is the state's alter ego for Eleventh Amendment purposes is whether the state controls the agency and the agency acts to further state policies. (States' Brief, p. 15) These States discuss the multiplicity of alter ego tests and believe they have produced inconsistent results. (States' Brief, p. 18-21)

The conflicting approaches in analyzing the important financial factor discussed by the Ristows in their Peti-

tion are essentially recognized by the States in their examination of the confusion as to the Authority's status illustrated by the decision of the Second Circuit in Feeney and the Third Circuit in Police Benevolent Association. (States Brief, p. 19-20) These States criticize the treasury factor and its pre-eminence and believe the state control test should be assigned the preeminent role in an Eleventh Amendment analysis. (State's Brief, p. 21-28)

4. THE AMICI COUNCIL'S POSITION

In the amicus brief filed by the Council of State Governments and others, these amici argue that the States' immunity from suit in federal court is an attribute of state sovereignty possessed by them when they joined the Union. (Council's Brief, p. 6) Congress can

abrogate such immunity, but it must unmistakably manifest such intent. (Council's Brief, p. 10-12) If Congress has not spoken with respect to immunity for an interstate agency and that agency performs state functions and remains answerable to the states, it is entitled to a presumption of immunity. (Council's Brief, p. 17-18) The fact that the States intended the entity to enjoy immunity and it remains subject to their control is then determinative. (Council's Brief, p. 18) Such intent and control exists in Hess. (Council's Brief, p. 18-22)

For a variety of reasons, these amici minimize the impact of the financial factor. (Council's Brief, p. 23-25) They also take an expansive view of the state treasury and express a preference

for the broad financial approach.

(Council's Brief, p. 24-25)

F. SUMMARY

A review of the arguments of the parties and amici in Hess reinforces the Ristows' contention in their Petition that a deep conflict exists as to the proper approach to be used in analyzing the important financial factor. The resolution of this conflict by the Court is certainly appropriate.

At this point, the key question is whether the decision in Hess will resolve the conflict as to the financial factor or otherwise provide guidance in the area. Hess, of course, involves a bi-state agency created by interstate compact, while the South Carolina State Ports Authority is an entity created solely by the State of South Carolina.

The Hess petitioners' position is based primarily on interstate compact grounds with reliance on the financial factor to a lesser degree.

In resolving the Hess case, the Court could limit its decision to interstate compact grounds or other grounds unrelated to the financial factor. Or the Court may elect to resolve the financial factor conflict or provide guidance in the area in the Hess decision. Since the Hess decision has the potential to resolve the financial factor conflict raised by the Ristows, it seems appropriate for the determination of the Ristows' case to await the outcome of Hess.

CONCLUSION

In light of the foregoing considerations, the Ristows request the Court to

grant their Petition for Certiorari because it clearly presents Rule 10 considerations and then defer further proceedings until Hess is decided. If such request is not felt to be appropriate, the Ristows then request the Court to defer a decision on whether to grant certiorari in their case pending the outcome in Hess.

Respectfully submitted,

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